SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 17

FORD MOTOR COMPANY,

Petitioner,

vs.

M L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OTION FOR REHEARING OF PETITIONER FORD MOTQR COMPANY

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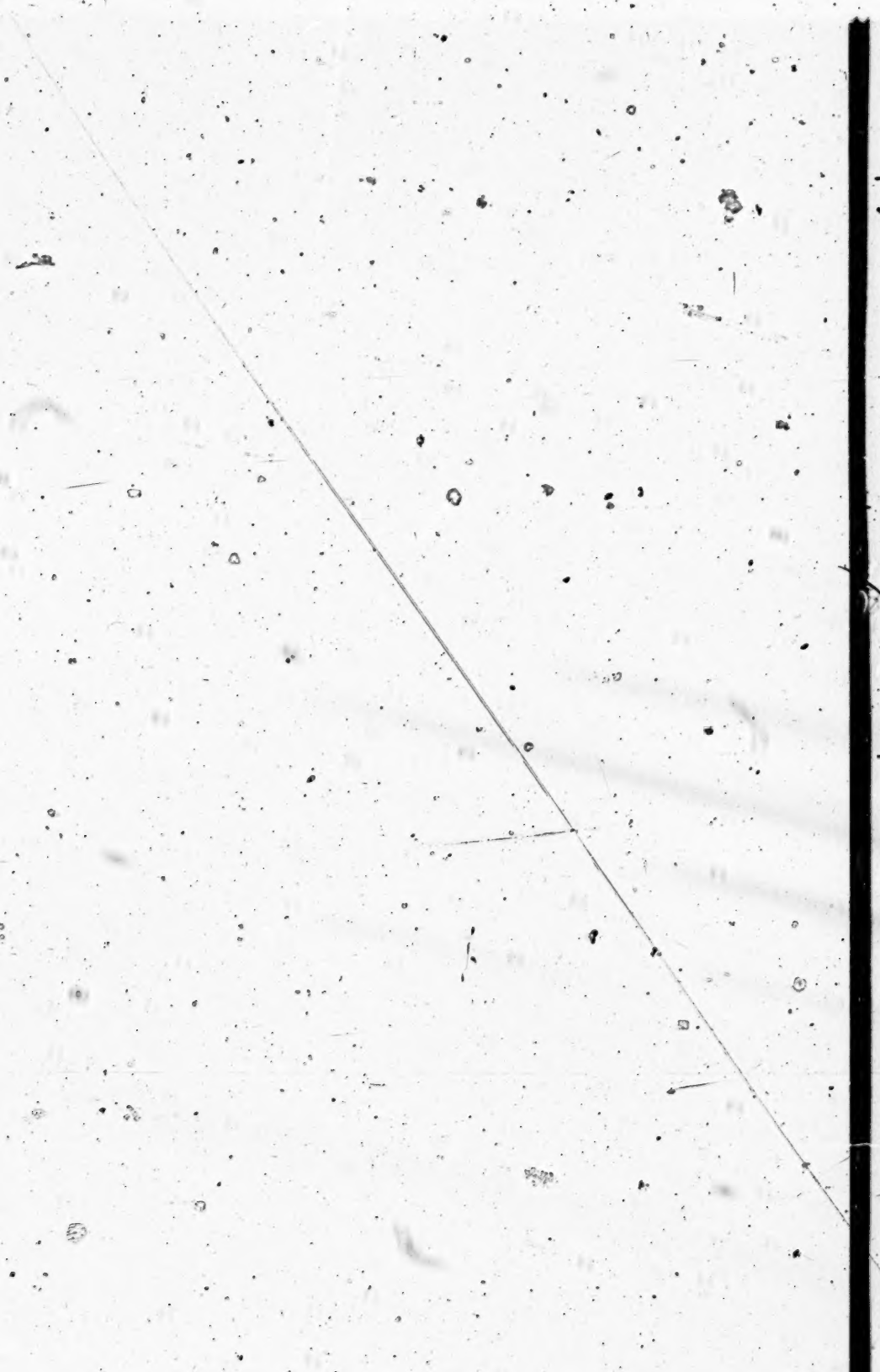

INDEX.

Subject Index.

Table of Cases Cited.

Statute Cited.

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MOTION FOR REHEARING OF PETITIONER FORD MOTOR COMPANY

May It Please The Court:

Petitioner Ford Motor Company, feeling aggrieved at the judgment and opinion of this Honorable Court rendered and delivered December 11, 1939, respectfully files this, its Motion for a Rehearing, and prays that on such rehearing the judgment of affirmance heretofore rendered be set aside,

and that the judgments of the District Court and of the Circuit Court of Appeals be reversed, and that petitioner be granted such relief as may be appropriate in the premises.

Foreword

Both the opinion and the results reached in this case establish landmarks in constitutional law.

The Court says: "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." Heretofore, it has been thought that though domestic corporations, by the acceptance of their charters from the state of their creation, subject themselves to such burdens as the right of the state to tax their property wherever situated, *Kansas City, etc. R.R. Co.* v. *Stiles*, 242 U. S. 111, foreign corporations were free of such burdens, and subject to taxation only on account of their property and activities *within* the state. Cf. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane*, 245 U. S. 178; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123.

The Court says: "In the unitary enterprise property outside the State, when correlated in use with property within the State, necessarily affects the worth of the privilege within the State." This is contrary to much that has gone before. Cf. *Fargo* v. *Hart*, 193 U. S. 491, where it is said: "The notion of organic unity may be made a means of unlawfully taxing a privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning," and that to measure a tax on a local privilege in relation to the value of property neither in the State nor devoted to the business for which the tax is exacted constitutes "taxing property outside of the State under a pretense". *Wallace* v. *Hines*, 253

U. S. 66, is to the same effect. In that case it is said: "The only reason for allowing the State to look beyond its borders when it taxes the property of foreign corporations is that it may get the *true* value of the things within it, when they are part of an organic system of wide extent, which gives them a value above what they otherwise would possess." These principles were followed by the Court as late as *Hans Rees' Sons* v. *North Carolina, supra*, the Court saying: "But the fact that the corporate enterprise is a unitary one in the sense that the ultimate gain is derived from the entire business does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State, *regardless of the extent to which it may be derived from the conduct of the enterprise in another State.*"

The Court for the first time in a tax case alludes to "financial power inherent in the possession of assets (which) may be applied with flexibility, at whatever point within or without the State the managers of the business may determine". It has heretofore been ruled that such considerations may be taken into account only in connection with entrance fees which have been held to be "not a tax but compensation for a privilege applied for and granted". These entrance fees have been strictly distinguished from franchise taxes proper, it being said that the latter, while sometimes called filing fees, are "in each case strictly a tax". It was on this theory alone that the Court supported the right of the State in *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, to look to property beyond its borders in assessing an entrance fee. In that case such cases as *Western Union Telegraph Co.* v. *Kansas, supra, Looney* v. *Crane, supra*, and others of similar import, were held inapplicable on the grounds that they involved, as does the present case, franchise taxes

proper which are "strictly a tax" and not "compensation for a privilege applied for and granted".

The Court rules the present case on the principles of *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 424-425. But the cases are radically different and obviously distinguishable. In the *Louisiana* case *the proof showed* and the Court found *as a fact* that extra-state property and activities, of the company involved, added in a clear and unmistakable way to the value of the intrastate privilege, and not only that, but presumptively to such an extent as to make the taxes fair and reasonable in relation to the intrastate privilege enjoyed. In short, under a legislative scheme *totally different* from that presented by the Texas Franchise Tax Law, it was held that the legislature had *fairly* measured the value of an intrastate privilege in relation to extra-state property and activities which added to the value of the intrastate privilege in a clear and unmistakable way.

The Court distinguishes *James* v. *Dravo Contracting Co.*, 301 U. S. 425, saying that the privilege tax there considered "* * * in so far as it was upon receipts * * * for work done in other States" was conceded to be outside the taxing power of the statute. But, the Court at one point appears to reject petitioner's contention that *local assets* rather than *local gross receipts* are used in the taxing formula. If the Texas statute falls upon gross receipts rather than upon assets employed in obtaining them, then *James* v. *Dravo Contracting Company, supra*, has unmistakable application because it is alleged and the demurrer admits that petitioner's Texas gross receipts are attributable in large measure to manufacturing property held and manufacturing activities conducted without the State.

It is respectfully urged that petitioner's contentions, which are based upon admitted allegations, deserve the Court's careful re-examination.

Specification of Error.

The Court erred in holding that as applied to a corporation situated as is petitioner, a State franchise tax based upon capital employed in Texas, calculated by the percentage of sales which are within the State, does not violate the due process clause of the Fourteenth Amendment as a tax upon property beyond the jurisdiction of the State, and as a tax upon extra-state property used in petitioner's interstate activities.

Remarks

The opinion does much to clarify the issue. There is a distinct holding that the basis of the tax is "capital employed in Texas". This is in accord with the Texas decisions. *Investment Securities Co. of Texas* v. *Meharg*, 115 Tex. 441; *Staples* v. *Kirby Petroleum Co.*, 250 S. W. 293.

The statutory formula results in allocating to Texas as assets "employed in Texas" $23,000,000 of petitioner's capital. It is clearly and unmistakably alleged, and the demurrer admits, that of petitioner's total capital, only somewhat over $3,000,000 is actually located, held or used in Texas, and that the excess property allocated to Texas is neither located nor used within the State. See the Petition (R. 10, R. 12) where the tax is alleged to be upon property "neither located nor used within the state of Texas" and upon "business transacted outside of the State of Texas," and "a tax on property neither located nor used within the State of Texas" and "a tax upon property used by plaintiff in its interstate and foreign commerce".

The issue is narrow, and the only question is whether the statutory allocation is arbitrary and capricious. Precedents afford ample standard by which to measure the validity of the results of the statute. It is true the State, in taxing a local privilege, may look to property beyond its borders,

but it is also true that the only reason for this "* * * is that it may get the true value of things within it when they are part of an organic system of wide extent that gives them a value above that which they might otherwise possess." *Wallace* v. *Hines, supra; Atlantic & Pacific Tea Co.* v. *Grosjean, supra.* The notion of organic unity, it has been said, is sometimes used as a means of "taxing property outside of the state under a pretense", and of unlawfully taxing a privilege or property outside of the State "under the name of enhanced value or good will". *Fargo* v. *Hart, supra.* This Court has observed, in the case of a unitary business, that "* * * the difficulty of making an exact apportionment is apparent" and that "* * * a method not intrinsically arbitrary will be sustained until *proof is offered* of an unreasonable and arbitrary application *in particular cases.*"

No prior decision of this Court supports the principle that a State may tax property beyond its borders. There is much to the contrary. The precedents are summarized in *Flint* v. *Stone Tracy Co.*, 220 U. S. 163, where it was said of a charter fee graded upon the entire capital stock of a foreign corporation engaged in commerce among the States and in commerce in other States that "looking through forms and reaching the substance of the thing * * * the tax thus imposed was in reality a tax upon * * * property beyond the limits of the State", and further "that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the Act in question was * * * to tax property beyond the jurisdiction of the State and * * * therefore invalid."

Granted a legislative purpose in the Act under review to lend enhanced value to intrastate property because of its relation to extra-state property and activities, the statute is still, upon the most elemental considerations, thoroughly arbitrary. Its clear and unmistakable effect is to allocate

to Texas all of petitioner's property to the extent that it is employed in producing articles of commerce sold *for the first time* in Texas—articles from which *no* gross receipts arise until they are sold intrastate in Texas. It cannot be that the value of the property in Texas is enhanced by exactly 100% of the value of all that is necessary to do what is done without the borders of the State. But as applied to petitioner this is the result of the statutory formula. Were petitioner to manufacture alone in Michigan and to sell alone in Texas, 100% of all petitioner's property both in Michigan and Texas would be allocated by the statutory formula to Texas alone. Thus the effect of the formula is to regard Texas as "the hub from which the spokes of the entire wheel radiate to the outer rim", and under it Texas refuses to lop off as foreign to Texas those elements of the business constituting a single unit which are in fact outside the confines of the State. This argument advanced by the Supreme Court of North Carolina in *Hans Rees' Sons* v. *North Carolina, supra,* was emphatically repudiated by this Court, saying "When * * * there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction".

As stated, were petitioner to manufacture solely in Michigan and sell solely in Texas, the statute would nevertheless allocate and attribute to Texas 100% of its entire manufacturing and selling activities. *Pro tanto,* under the facts alleged, that is the operation of the statute on petitioner. By the device of adopting the ratio of *gross receipts from* business done within Texas to gross receipts from all business wherever done, Texas draws to itself petitioner's en-

tire property and activities, both beyond and within the State, to the extent that those properties and that activity eventually culminate in intrastate sales. Were petitioner to operate through a Texas sales subsidiary, as some of its competitors, the matter would adjust itself. There would be receipts from Michigan manufacturing activities upon the sale and delivery by the manufacturing parent corporation to the Texas sales subsidiary. But this is not the case, and under petitioner's unitary corporate structure the entire weight of petitioner's far flung unitary activity is ascribed, under the statutory formula, to Texas, and the value of all property used therein is allocated by the statute in its entirety to Texas. The arbitrary quality of the statute, as applied to a manufacturing corporation such as petitioner, would seem obvious.

If the question be, as it is, one of apportionment, then the answer lies in the bare statement that apportionment is altogether wanting under the statute. It is no apportionment to allocate to Texas *all* of petitioner's property and activities which ultimately result in Texas sales, and to attribute to other States no part, however small, of this unitary property and activity.

Bass, Ratcliff & Gretton, Ltd. v. *Tax Comm.*, 266 U. S. 271, and *Underwood Typewriter Co.* v. *Chamberlin*, 254 U. S. 113, cited and discussed in the opinion, do not support the court's conclusions here. These cases are inapplicable *to the facts* plead in the petition, and admitted by respondents' demurrer.

In the *Underwood Typewriter* case, plaintiff contended that 47% of its net income was not reasonably attributable to the *manufacture* of products from the sale of which 80% of its gross earnings were derived. But in that case the plaintiff did not even attempt to show this, and the opinion states that for aught that appears, the percentage of net profits earned in Connecticut may have been much larger

than 47%, and concluded consequently there was nothing to show either that the *method of* apportionment was arbitrary on its face, or in its application to the Typewriter Company.

The *Bass, Ratcliff & Gretton* case is of entirely similar import. It was decided on the principles of the *Underwood Typewriter* case, and on the express statement that it was not shown, any more than in the *Underwood* case, that the application of the statutory method of apportionment had produced an unreasonable result.

How different here, where the legislative scheme is to measure the tax by "the actual capital of such corporation employed by it in its Texas business". *Staples* v. *Kirby Petroleum Co., supra*—"total gross assets employed by the corporation in the transaction of its business in Texas", *Investment Securities Co. of Texas* v. *Meharg, supra*—, and the result of the statutory formula is so far short of apportionment, in any degree, that it allocates to Texas as property employed in Texas the entire total of petitioner's extra-state capital and assets to the full extent that those extra-state properties and activities result ultimately in gross receipts from Texas sales.

What the court has done, by its opinion, is to say that one State may tax a corporation upon its entire capital devoted to a unitary activity, consisting of manufacturing, assembly and sales functions, even though that property lies in part beyond the State and is devoted in part entirely to activities conducted beyond the State. We say this because it would take but a reverse application of judicial reasoning to support a Michigan statute which would attribute to Michigan all the value of petitioner's Texas property used in its assembly and sales functions, conducted entirely in Texas.

National Leather Co. v. *Massachusetts*, 277 U. S. 413, is not in point. The case holds only that the ownership of

physical assets present in a State, the title to which is in a subsidiary corporation, may be attributed, for purposes of measuring a privilege tax, to the parent company, and thus that the corporate fiction may be disregarded in determining the ownership of the property of the subsidiary corporation. It is not thought that *National Leather Co.* v. *Massachusetts, supra*, touches upon the question of reasonable apportionment.

International Shoe Co. v. *Shartel*, 279 U. S. 429, and *New York* v. *Latrobe*, 279 U. S. 421, cited in the Court's opinion, it seems to us; are of no help here. Neither involves a question of apportionment. The holding in each is limited to the right of a State to value non-par stock arbitrarily for franchise tax purposes. This was said to affect only the rate of tax. But the Court in those cases was careful to distinguish the taxes involved in such cases as *Airway Elec. Appliance Corp.* v. *Day*, 266 U. S. 71; *Looney* v. *Crane, supra*, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, "which either were measured by authorized instead of issued capital stock, or were not limited to the part of the capital stock *justly apportioned to the taxing state.*"

The Court holds that in determining the value of an intrastate privilege, weight may be given to property beyond State boundaries in recognition of the very real effect of this property upon the value of the local privilege. This, of course, is the principle announced in *Atlantic & Pacific Tea Co.* v. *Grosjean, supra*. The principle is not new. Granting the soundness of the Court's decision in *Tax Commissioners* v. *Jackson*, 283 U. S. 527, it cannot logically be contended that State boundaries insulate against the application of those principles. But here the case is different. The legislative scheme, as the Court holds, is to base the tax *upon capital employed in Texas.* It is specifically and repeatedly alleged in the petition that of petitioner's capital, only approximately $3,000,000 is employed

in Texas. This the State admits by its demurrer, but the Court, in the face of the admitted allegations, sustains a statute which by arbitrary legislative fiat classifies as property employed in Texas some $20,000,000 of petitioner's property not actually located in Texas, but situated and actually used in petitioner's manufacturing operations wholly foreign to its Texas assembly and sales functions. This, it is submitted, is unsupportable both in fact and in theory.

The statutory allocation is without appeal to the intelligence. Under it, as is shown by the tabulation appended at page 5 of petitioner's reply brief, a $200,000,000 corporation, doing slightly less than $8,000,000 of Texas business, is required to pay the same tax as a corporation of precisely similar capital, doing slightly less than $40,000,000 of Texas business, the differentiating factor in the two instances lying solely in the amount of extra-state business done by the two companies. Viewed as a tax related to gross receipts from Texas operations, the statute is fantastic. Similarly, viewed as a tax upon capital employed in Texas operations, the statute, which allocates to Texas 100% of the property and activities of a manufacturing corporation such as petitioner, to the extent that this property and activity ultimately result in Texas sales, is irrational, arbitrary and capricious. If, as in the past, it is the function of the Court to look through form to the substance of things, the case at bar abundantly justifies the exercise of the function here.

We have no disagreement with the statement that the Constitution recognizes the dual interests of the State and National Governments, and permits a tax by local government upon intrastate activities of far-flung enterprises, protected by the commerce clause. However, this is not to say that a tax on a local franchise must not bear some reasonable relation to the privilege granted. Subject to this lim-

itation, State legislatures may select any appropriate measure of taxation. Here, the measure selected is capital employed in the Texas business, and the tax may properly be measured in any intelligent fashion by that factor. But State power under the national constitution may not be made the means of placing an exaction upon a privilege granted by another State, nor of exacting a levy on property employed solely in the exercise of privileges granted by other States. The right to tax what lies within and what is done within its own borders inheres in each State, and freedom from interference with this right is sacred to each jurisdiction. If these principles still obtain, how can it be that this Texas statute is fair and reasonable, and results only in a just apportionment of extra-state property to Texas when, however viewed, it allocates to Texas an overwhelmingly disproportionate part of petitioner's manufacturing capital located and held in other States and used in the exercise of privileges conferred by other States? If the Court's opinion is to stand, then, in fact, the values upon which the tax is computed are represented in capital actually employed in business wholly outside of and foreign to Texas, and through some process of judicial reasoning petitioner's capital employed solely in Michigan manufacturing activity has been found to be employed in Texas.

We direct attention to the court's reference to the ability of managers of corporate business to employ financial power, inherent in the possession of assets, with flexibility at whatever point, within or without the State, the managers may determine. In the light of the scheme of taxation, these remarks are inapplicable to the case at bar. The statute measures the annual franchise tax entirely in relation to the corporate status and corporate business during its fiscal year *next preceding* that for which the tax is exacted. In other words, the legislative scheme has no regard for what the managers may do with the corporation's assets

during the year for which the tax is paid. On the contrary, the State looks entirely to what *was done* with these assets, and the results obtained in the corporate enterprise *during the next preceding fiscal year*. By Article 7089, Revised Statutes of Texas, 1925, corporations subject to annual franchise taxes are required to make a sworn report showing the condition of the corporation on the last day of the preceding fiscal year. In the report the corporation must state the cash value of its gross assets, the amount of its capital stock, capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficit, if any, the amount of its mortgage and current indebtedness, its total gross receipts from all sources, and its gross receipts from Texas business and various other data for the *fiscal year preceding*. Franchise taxes for the year next succeeding are calculated upon this data. Looking then to the express statutory scheme, there is no room to consider what the corporate managers may do with corporate capital not used within the State during its next preceding fiscal year. There is no justification for the court disregarding the legislative scheme and justifying the tax on the possibility that extra-state financial power and capital may be used during the year for which the annual tax is paid, when the legislature has not concerned itself with these possibilities. In all events, so long as particular financial power and capital is employed by corporations outside a given State, then a franchise tax levied by such State, based upon that capital employed beyond its borders, is improper and cannot be said to bear any reasonable relation to the local privilege.

To support the statute, the court presumes petitioner's property beyond the State boundaries to be of very real effect upon the value of the local privilege. Even if these considerations could be said to be appropriate to a differ-

ent taxing scheme, and to taxpayers differently situated, they are without application to the case at bar. If facts were pleaded, or evidence proved, to establish that petitioner's property outside of Texas adds to the value of the Texas privilege, the case would be different. But here petitioner pleads, and respondents by their demurrer admit, that none of petitioner's some $20,000,000 of extra-state property, allocated by the statute to Texas, is held, located or used in Texas: On the record, has not the court gone far afield by some process of judicial notice in finding, in the face of the admitted facts, that this extra-state property is actually employed within the State? If the court will refer to the exhibits shown at pp. 20B and 21 of the Record, it will be seen at a glance that of this $20,000,000 of allocated capital, slightly in excess of $18,000,000 is actually located in Michigan, and consists in part of such items of property as land, buildings, blast furnaces, coke ovens, open hearth furnaces, and steel mills. It is inconceivable that this property is employed in Texas where petitioner's sole activity consists in the assembly and sale of motor cars, and in the sale of parts therefor.

The court says: "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." If this statement be accepted at face value, the court is announcing a new principle of constitutional law at war with what has heretofore been considered well settled. Prior cases draw a distinction between the right of a State to tax domestic corporations which take their existence from the taxing State, and the right of a State to tax foreign corporations enjoying at the hands of the State only a local privilege. In the case of the former, it has been held that property wherever situated may be regarded in levying franchise

taxes, *Kansas City, etc. R. R.* v. *Stiles, supra, Kansas City, etc. Ry. Co.* v. *Kansas*, 240 U. S. 277. But in the case of the latter, local government has been limited in the measure of taxation to that property and those activities which relate to the value of the local privilege. *Western Union* v. *Kansas, supra, Looney* v. *Crane, supra.*

It is difficult to know whether the Court has supported the Texas tax on the theory that the property in Michigan and other States is actually employed in Texas, or on the theory that whether employed in Texas or not, this property may be used by Texas as a basis for taxation. If the ruling is Texas may base its tax on property neither located nor employed in Texas, then the Court has rejected precedent of many years standing. It is unlikely, we think, the Court would do this without discussion of prior decided cases, and we therefore assume that the sole basis of decision is that approximately $20,000,000 of petitioner's capital alleged to be located and used entirely without the State is, petitioner's allegations to the contrary notwithstanding, held in legal effect to be actually employed in Texas business. This holding we believe incorrect on the self-evident proposition that steel mills, coke ovens, blast furnaces, land, buildings, etc., located in Michigan and devoted exclusively to Michigan manufacturing operations, cannot be said to be employed in petitioner's Texas business, which consists solely in the assembly of manufactured parts into motor vehicles, and the sale of such motor vehicles and parts therefor.

Conclusion

Petitioner urgently and respectfully solicits a re-examination of its contentions. The principles involved are of widespread effect and importance, and deserve the Court's fullest consideration before being finally decided.

Wherefore, petitioner prays that it be granted a rehearing herein, and that the judgment of affirmance heretofore

rendered be set aside, and that the judgments of the District Court and of the Circuit Court of Appeals be reversed, and that petitioner be granted such relief as may be appropriate in the premises.

Respectfully submitted,

FORD MOTOR COMPANY,
By GAIUS G. GANNON,
Attorney for Petitioner.

Certificate of Counsel

I, Gaius G. Gannon, of Counsel for Petitioner Ford Motor Company, hereby certify that the foregoing Motion for a Rehearing is presented in good faith and not for delay.

GAIUS G. GANNON.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1939.

Ford Motor Company, Petitioner, vs. Tom L. Beauchamp, Secretary of State of the State of Texas, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 11, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The question for determination in this proceeding is the validity, as applied to this petitioner, of a statute of the State of Texas levying an annual franchise tax on all corporations chartered or authorized to do business in Texas, measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits of the corporation, plus its long term obligations, as the gross receipts of its Texas business bear to the total gross receipts from its entire business.

The Court of Appeals[1] affirmed the judgment of the District Court, upholding the validity of the tax. On account of an alleged probable conflict with the principles underlying certain decisions of this Court certiorari was granted.[2] The applicable provisions of the statute appear below.[3]

By Article 7057b of the Revised Civil Statutes of Texas any corporation which may be required to pay any franchise or other privilege tax may pay it under written protest and bring suit within a limited time thereafter in any court of competent jurisdiction in Travis County, Texas, against the public official charged

[1] Ford Motor Co. v. Clark, 100 F. (2d) 515.

[2] 306 U. S. 628.

[3] "Article 7084. Amount of Tax.—(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, . . . each year, pay . . . a franchise tax . . . , based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars ($1,000.00) or fractional part thereof; One Dollar ($1.00) to One Million Dollars ($1,000,000.00), sixty cents (60¢) . . . "

with the duty of collecting such tax, the State Treasurer and the Attorney General, for its recovery. This suit was instituted in the District Court of the United States, Western District, Austin Division, against the state officials authorized to be made defendants. Defendants joined in a demurrer on the ground that no cause of action was set out in the petition.

Petitioner owns and operates a large manufactory of motor vehicles in Michigan and assembly plants in Texas. No parts for the automobiles produced by petitioner are manufactured at any point within Texas. The manufactured parts are shipped to petitioner's assembly plants in Texas and are there assembled. The assembled vehicles are sold in intrastate commerce to various dealers who in turn sell the vehicles to the public. A relatively small number of completed vehicles are shipped into Texas and later sold in intrastate commerce along with large quantities of motor parts and accessories. Without undertaking to be precise, the gross receipts from business done in Texas for the year in question amounted to approximately $34,000,000. Petitioner's total gross receipts were about $888,000,000. The ratio of Texas receipts to total receipts was 3.85+ per cent. Petitioner's total taxable capital was $600,000,000+. The value of all assets located in Texas was somewhat over $3,000,000, while the value of the capital allocated to Texas as a base for taxation by the statutory formula would be in excess of $23,000,000.

For the taxable year beginning May 1, 1936, a franchise tax was tendered Texas in the sum of $1,224, computed on the actual net book value of all of petitioner's assets in Texas. On demand and under protest an additional franchise tax and penalty was paid in the sum of $7,529, based on the allocation to Texas of capital as calculated by the statutory formula. This suit was brought to recover the alleged unlawful exaction.

This exaction, petitioner pleads, is calculated from a formula that results in the levy of a tax on assets used in petitioner's interstate business in violation of Article I, Section 8, of the Constitution. It is further alleged that the tax operates to deprive petitioner of its property without due process of law in violation of the Fourteenth Amendment because it must pay a tax on property neither located nor used within the State of Texas and on activities beyond the borders of Texas.

The statute calls the excise a franchise tax. It is obviously payment for the privilege of carrying on business in Texas.[4] There is no question but that the State has the power to make a charge against domestic or foreign corporations for the opportunity to transact this intrastate business.[5] The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated.

The motor vehicles for the marketing of which the privilege is used are concededly sold in intrastate commerce. The tax here levied is not for the privilege of engaging in any transaction across state lines or activity carried on in another state. It is much like that upheld in *Bass, Ratcliff & Gretton, Limited*, v. *Tax Commission*.[6] In that case a tax was laid for the privilege of doing business in New York determined, for corporations which did not transact all their business within that state, by a percentage of that part of the net income which is calculated by the proportion which the aggregate of specified classes of property within the state bears to all the property of the corporation.[7]

In *National Leather Company* v. *Massachusetts*[8] this Court upheld a tax for the privilege of doing business in a state by a corporation of an amount "equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth." This excess was defined as "such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets, both real and personal, employed in any business within the commonwealth . . . bears to the value of the total

[4] Investment Securities Co. v. Meharg, 115 Texas 441; United North & South Development Co. v. Heath, 78 S. W. (2d) 650 (Tex. Civ. App.).

[5] Ficklen v. Shelby County Taxing District, 145 U. S. 1, 21; American Mfg. Co. v. St. Louis, 250 U. S. 459; Matson Nav. Co. v. State Board, 297 U. S. 441; Western Live Stock v. Bureau, 303 U. S. 250; Coverdale v. Pipe Line Co., 303 U. S. 604, 608.

[6] 266 U. S. 271.

[7] Cf. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120.

[8] 277 U. S. 413.

assets of the corporation." The National Leather Company, a Maine corporation, owned the stock of two other Maine corporations. Their plants were in Massachusetts. On the assumption that the situs of the stock followed the domicile of the owner, the taxpayer challenged the inclusion of the Maine stock in the basis for the local tax. This Court held that Massachusetts was free to use the stock for the calculation of the local tax. Similar methods of determining privilege taxes were left to the states in *International Shoe Company* v. *Shartel*[9] and *New York* v. *Latrobe*.[10] The Constitution recognizes the dual interests of the national and state governments and permits taxes for local privileges upon the intrastate activities of the farflung enterprises which gain large benefits from the nationwide market, protected by the commerce clause. We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula.

In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located.[11] The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. This was recognized by this Court in *Atlantic & Pacific Tea Company* v. *Grosjean*[12] where an occupation or license tax on chain stores was graduated "on the number of stores or mercantile establishments" included under the same management "whether operated in this State or not." We said: "The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the

[9] 279 U. S. 429.

[10] 279 U. S. 421.

[11] Atlantic Refining Co. v. Virginia, 302 U. S. 22, 29; cf. Kansas City, Fort Scott & Memphis Ry. v. Botkin, 240 U. S. 227, 235.

[12] 301 U. S. 412, 424-425.

whole organization, but in their setting as integral parts of a much larger organization."[13] This same rule applies here. *James* v. *Dravo Contracting Company*[14] contains nothing contrary to this view. The statute under consideration there levied a privilege tax "equal to two per cent of the gross income of the business." In so far as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute.

Affirmed.

Mr. Justice McREYNOLDS is of opinion that the judgment complained of should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[13] 301 U. S. 425.

[14] 302 U. S. 134, 139.